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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

CINDY WINWARD,
Plaintiff,

Nos. C 07-0878 SBA
C 07-0879 SBA

v.

ORDER

PFIZER INC., *et al.*,
Defendants.

KIMBERLY CABLE,
Plaintiff,

v.

PFIZER INC., *et al.*,
Defendants.

Before the Court is plaintiffs Cindy Winward and Kimberly Cable's motion to consolidate their separate actions into one proceeding pursuant to Federal Rule of Civil Procedure 42(a) [Docket Nos. 17, 26]. Also before the Court is defendants Pfizer, Inc., Pharmacia Corporation, Pharmacia & Upjohn LLC, and Pharmacia & Upjohn Company, LLC's (collectively "defendants") motion to transfer these cases to other venues [Docket Nos. 22, 30]. After reading and considering the arguments presented by the parties, the Court finds these matters appropriate for resolution without a hearing. *See* FED. R. CIV. P. 78. For the reasons that follow, the motion to consolidate is DENIED and the motion to transfer venue is GRANTED.

BACKGROUND

Plaintiff Cindy Winward resides in Price, Utah. Plaintiff Kimberly Cable is a citizen of Harrisburg, Pennsylvania. Both plaintiffs have instituted actions against the defendants alleging they were injured from the use of Depo-Provera Injectable Contraceptive (a.k.a, DMPA, or depot medroxyprogesterone acetate), a prescription pharmaceutical for the prevention of pregnancy

1 manufactured, sold, distributed, developed, and marketed by the various defendants. The plaintiffs
2 claim Depo-Provera causes women to sustain permanent loss of bone-mass density.

3 Cindy Winward was diagnosed with osteoporosis in 2006, and asserts it was caused by the use
4 of Depo-Provera. Winward brings causes of action for: (1) negligence for failing to adequately test for
5 the risks of Depo-Provera and for failing to provide adequate warnings of the risks of the drug; (2)
6 product liability; (3) negligent misrepresentation; (4) intentional misrepresentation; (5) breach of express
7 warranty; (6) breach of implied warranty; (7) negligent infliction of emotional distress; and (8)
8 intentional infliction of emotional distress. Kimberly Cable is also suing the same defendants, alleging
9 she developed osteoporosis due to the use of Depo-Provera. She brings the same causes of action.

10 On March 12, 2007, the Court found that *Cindy Winward v. Pfizer Inc., et al.*, 07-0878 and
11 *Kimberly Cable v. Pfizer Inc., et al.*, 07-0879 are related actions. On April 10, 2007, the plaintiffs
12 submitted a motion to the Judicial Panel on Multidistrict Litigation to consolidate their actions with
13 *Riddell v. Pfizer* Case No. 06-5418, a class action pending in the District of New Jersey. This was
14 denied by the MDL Panel on August 6, 2007.

15 The plaintiffs are now requesting that their two actions be consolidated into one proceeding
16 before this Court. The defendants request that the Court transfer the plaintiffs' cases to the United States
17 District Court for the Middle District of Pennsylvania and the United States District Court for the
18 District of Utah, respectively.

19 20 LEGAL STANDARDS

21 Title 28 U.S.C. § 1404(a) declares that “[f]or the convenience of the parties and witnesses, in
22 the interest of justice, a district court may transfer any civil action to any other district or division where
23 it might have been brought.” A determination of whether an action should be transferred is a two-step
24 analysis. First, the court must determine whether the action “might have been brought” in the potential
25 transferee court. *See Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960); *Hatch v. Reliance Ins. Co.*, 758
26 F.2d 409, 414 (9th Cir. 1985). If so, then the court makes an “individualized, case-by-case
27 determination of convenience and fairness,” weighing (1) the convenience of the parties; (2) the

convenience of the witnesses; and (3) the interest of justice. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (citation omitted). In weighing these factors, the court may take into account: “(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff’s choice of forum, (4) the respective parties’ contacts with the forum, (5) the contacts relating to the plaintiff’s cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.” *GNC Franchising, Inc.*, 211 F.3d at 498-99. The burden is on the moving party to show that transfer is appropriate. *See Commodity Futures Trading Comm’n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979); *Carolinas Cas. Co. v. Data Broadcasting Corp.*, 158 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001).

ANALYSIS

Because this Court will lose jurisdiction over these proceedings if they are transferred, it is prudent to consider the motion to transfer before determining the appropriateness of consolidation. *See, e.g., State of Utah v. American Pipe & Constr. Co.*, 316 F. Supp. 837, 839 (C.D. Cal. 1970) (jurisdiction ceases after an order transferring venue). The short version of the defendants’ argument in favor of transfer is that:

(1) neither plaintiffs nor the subject matter of their claims have any connection with the forum state; (2) plaintiffs’ claims arise from their use of the prescription medication Depo-Provera® Contraceptive Injection (“DPCI”), which occurred exclusively in their respective home states; (3) relevant witnesses and sources of proof are located in the transferee districts, not the forum state; and (4) the interests of justice weigh in favor of transfer.

Docket No. 31, at 1.

The plaintiffs purport to oppose transfer, but most of their efforts aim to persuade that New Jersey is in fact that most appropriate venue for these two cases, and that if the Court transfers these actions, it should do so to that district. However, the plaintiffs have no motion before the Court actually requesting a transfer of venue to the District of New Jersey. While a district court may transfer venue *sua sponte*, it is not clear why the plaintiffs could not voluntarily withdraw their actions and refile in

1 New Jersey. The plaintiffs have not suggested that the statute of limitations have run or that there is any
2 other obstacle to doing so. Accordingly, the Court will focus on the request actual before it---a transfer
3 of these cases to Utah and Pennsylvania.

4
5 **1. Propriety of Venue in the District of Utah and the Middle District of Pennsylvania**

6 The first step is for the Court to determine if the District of Utah and the Middle District of
7 Pennsylvania are venues where these actions “might have been brought.” The defendants assert they
8 are, and the plaintiffs make no contention otherwise. The defendants state that they are subject to the
9 personal jurisdiction of each potential transferee court, and that both transferee courts have subject
10 matter jurisdiction based on the diverse citizenship of the parties.

11 The parties agree on the citizenship of both plaintiffs and the defendants. As previously noted,
12 Winward is a resident of Utah and Cable is a resident of Pennsylvania. Defendant Pfizer, Inc. is a
13 Delaware corporation with its principal place of business in New York. The remaining defendants are
14 Delaware corporations with their principal places of business in New Jersey. Given the diversity of
15 citizenship of the parties, the District of Utah and the Middle District of Pennsylvania are venues where
16 these actions might have properly been brought.

17
18 **2. Weighing of Transfer Factors**

19 **A. The Plaintiffs’ Choice of Forum**

20 Having successfully cleared the initial hurdle of demonstrating an alternative forum, the Court
21 weighs the various factors for transfer. In the usual case, unless the balance of the section 1404(a)
22 factors weigh heavily in favor of the defendants, the plaintiff’s choice of forum should rarely be
23 disturbed. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986);
24 *Securities Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985). However, “[i]f the
25 operative facts have not occurred within the forum of original selection and that forum has no particular
26 interest in the parties or the subject matter, the plaintiff’s choice is entitled only to minimal
27 consideration.” *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968); *see also Lou*

1 *v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (same); *Allegiance Healthcare Corp. v. London Int'l*
2 *Group, PLC*, 1998 WL 328624, at *1 (N.D. Cal. 1998) (“the plaintiff’s choice of forum commands only
3 minimal consideration . . . where he is not a resident of the district where he instituted suit, the operative
4 facts have not occurred within the forum, and the forum has no particular interest in the parties or
5 subject matter”).

6 Neither Winward nor Cable are residents of California. Neither plaintiff was prescribed nor used
7 the contraceptive in this state. There is no suggestion that the plaintiffs have been treated for their
8 alleged injuries in California. The plaintiffs’ prescribing and treating physicians are located within their
9 respective home states. The plaintiffs’ only suggestion of a connection with California is their statement
10 that “it is not clear to plaintiffs to what extent Pfizer La Jolla Laboratories was responsible for the
11 research, testing, development, manufacturing, sales, distribution, promotion, labeling and marketing
12 of Depo-Provera, the drug that injured plaintiffs.” Docket No. 43, at 8.

13 Shortly thereafter, the plaintiffs go on to somewhat undercut the suggestion of any involvement
14 by the laboratory in California by asserting that, “[t]he percipient and fact witnesses on liability for the
15 most part all reside in the state of New Jersey.” *Id.* The plaintiffs add that New Jersey “is the location
16 where Depo-Provera was researched, designed, manufactured, and/or sold” and that the “defective drug
17 was manufactured, distributed, promoted, marketed and placed into the stream of commerce in the State
18 of New Jersey” *Id.* at 8-9.

19 The defendants have submitted an affidavit that “No activity related to the manufacture, sale,
20 distribution, development, labeling, packaging, or marketing of Depo-Provera® Contraceptive Injection
21 is conducted at Pfizer’s La Jolla, California facility.” Docket No. 45 (Biaison Decl. at ¶ 22).

22 Thus, there is no evidence that California has a particular interest in the parties or the subject
23 matter of these two actions. The Court finds that the plaintiffs’ choice of forum is therefore entitled to
24 only minimal consideration.

25 **B. Convenience of the Parties**

26 Neither party argues that this Court provides a convenient forum. Indeed, despite disagreement
27 by the parties over where the most appropriate venue is, the parties agree that with respect to the
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1 individual plaintiffs, the defendants, and the potential witnesses, this venue is not the most convenient.

2 One plaintiff is located in Pennsylvania, while the other is in Utah. The defendants are either
3 incorporated or have their principal places of business in New York, New Jersey, or Delaware, all on
4 the East Coast. The plaintiffs' only argument for venue in this judicial district is that California is the
5 location of their counsel. The plaintiffs contend that if their actions are transferred to their home states,
6 each plaintiff would be required to locate and retain legal local representation. This will
7 be difficult. If representation is not available, plaintiffs' actions will be dismissed for
8 lack of prosecution, since current counsel would not be able to continue with
representation if the actions are transferred. As a result, plaintiffs will have effectually
been denied due process.

9 Docket No. 43, at 3.

10 The location of counsel and the need to retain counsel in the transferee district is of little, if any,
11 weight in considering a motion to transfer pursuant to section 1404(a). *See, e.g., In re Volkswagen AG*,
12 371 F.3d 201, 206 (5th Cir. 2004) (per curiam); *Solomon v. Continental Am. Life Ins. Co.*, 472 F.2d
13 1043, 1047 (3d Cir. 1973); *Gelber v. The Leonard Wood Mem'l*, 2007 WL 1795746, at *4 n.2 (N.D. Cal.
14 2007); *Guerrero v. Habla Comunicaciones*, 2006 WL 696646, at *2 n.1 (S.D. Tex. 2006); *Panetta v.*
15 *SAP Am., Inc.*, 2005 WL 1774327, at *5 (N.D. Cal. 2005) ("the location of plaintiff's counsel is
16 immaterial to a determination of the convenience and justice of a particular forum"); *Strauss v. Wet*
17 *Highland Captial, Inc.*, 2000 WL 1505957, at *3 (S.D.N.Y. 2000) (citation omitted) ("Inconveniences
18 due to plaintiff's need to retain counsel in the transferee district 'is of little, if any, weight, on a motion
19 to transfer'"). Moreover, the plaintiffs offer no explanation of why representation would not be
20 available in either Utah or Pennsylvania. The Court finds then, that this district is not a convenient
21 forum for either party and that the plaintiffs' home states would be a more convenient venue for the
22 parties.

23 C. Convenience of the Witnesses

24 The defendants argue that most of the relevant witnesses are in the plaintiffs' home states---the
25 plaintiffs themselves, their families, and their prescribing and treating physicians. The plaintiffs argue
26 that most of the relevant witnesses are employees of the defendants located in New Jersey. Thus, again,
27 wherever the most convenient forum for the witnesses is located, it is clear that it is not in this judicial
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1 district.

2 As for plaintiff Cable, Pennsylvania will be a much more convenient forum for witnesses, who
3 are, by the parties' accounts, located in either that state, or in the neighboring state of New Jersey. With
4 respect to plaintiff Winward, whether more of the witnesses are located in Utah or located in New
5 Jersey, a California forum is not particularly convenient to any of the potential witnesses. Accordingly,
6 either Utah or Pennsylvania are more convenient forums for the witnesses than is the Northern District
7 of California.

8 9 **3. The "Cross-Motion" and the Plaintiffs' Opposition**

10 As a final note, both parties raise procedural objections. The plaintiffs object that the
11 defendants' "cross-motion" is not a recognized procedural device and that the motion to transfer was
12 not properly noticed. The defendants object that the plaintiffs did not file a timely objection to the
13 motion to transfer and the motion should be granted as unopposed. Neither objection is particularly
14 weighty and in the interests of timely disposition, the Court has chosen to consider and resolve the
15 motion on the merits.

16 With respect to the plaintiffs contention that a "cross-motion" is not recognized as a proper
17 motion, this places too much emphasis on a less than meaningful label.¹ As for the argument that the
18 motion to transfer was not properly noticed, the docket reflects that it was in fact noticed twice: once
19 on June 26, 2007, and again on July 12, 2007. *See* Docket Nos. 22, 30. Turning to the defendants'
20 argument that the opposition should not be considered because of its untimeliness, given that the Court
21 is finding in the defendants' favor, this objection is moot.

22 23 **CONCLUSION**

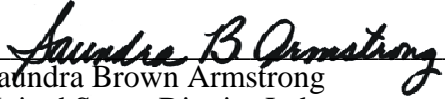
24 Accordingly, the Court DENIES plaintiffs Cindy Winward and Kimberly Cable's motion to
25 consolidate their separate actions into one proceeding [Docket Nos. 17, 26]. The Court GRANTS the

26 ¹ Moreover, it is not uncommon for parties to, for instance, file "cross-motions" for summary
27 judgment.

1 defendants' motion to transfer the plaintiffs' cases to other venues [Docket Nos. 22, 30]. *Cindy*
2 *Winward v. Pfizer Inc., et al.*, 07-0878, is hereby transferred to the United States District Court for the
3 District of Utah. *Kimberly Cable v. Pfizer Inc., et al.*, 07-0879, is hereby transferred to the United States
4 District Court for the Middle District of Pennsylvania. The Clerk of Court is directed to transfer the
5 files to those districts accordingly and thereafter close all pending matters and the case file.

6 IT IS SO ORDERED.

7
8 October 18, 2007


Sandra Brown Armstrong
United States District Judge